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**UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION**

11 UNITED STATES OF AMERICA,)	
)	NO. CR08-00377-RMW
12 Plaintiff,)	
)	DEFENDANT'S CHALLENGE
13 vs.)	OF SEARCH WARRANT AND
)	MOTION FOR LATE
14)	DISCOVERY
)	
15 THOMAS McINTOSH, JR.,)	Hearing: January 8, 2009
)	Time: 2:00 p.m.
16 Defendant.)	Court: Hon. Ronald M. Whyte

17

18 Mr. McIntosh stands charged with, as a felon, unlawfully possessing a firearm. The

19 firearm was recovered pursuant to a search warrant signed by the Honorable Steven Sand, Judge

20 of the Superior Court of San Benito County and executed February 1, 2008. The subject warrant

21 sought drugs and alleged evidence of drug dealing. No drugs nor indicia of sales were found

22 although the property and all outbuildings were thoroughly searched by a team of narcotics

23 "experts." The affidavit in support of probable cause was executed by Robert Padilla, a

24 California Highway Patrol Auto Theft Investigator assigned to Coastal Division Investigative

25 Service Unit. Officer Padilla requested and Judge Sand ordered that portions of the affidavit

26 (pages 4-8) be sealed pursuant to California Evidence Code Section 1040 and *People v. Hobbs*,

27 Cal.4th 948 (1994) in order to protect the identity of the informant.

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1 AUSA Glang recently indicated he would provide the Court with the entire search
2 warrant affidavit including the portion that has been sealed from defense counsel so that the
3 Court may review it *in camera* to determine whether the heretofore sealed portions should be
4 unsealed and provided to the defense.

5 The defense has reason to believe that the informant in this case also acted as an
6 informant in a 2004 incident where Mr. McIntosh was handcuffed at a residence and later
7 released and uncharged. The language contained in the search warrant affidavit that is unsealed
8 appears to be the same exact language used in the 2004 search warrant. Accordingly, the defense
9 has concerns that the informant's information was stale. If our concerns are well-founded, there
10 would be a viable suppression motion which would obviate the need for trial.

11 The defense has an additional concern regarding the issuance of the search warrant in this
12 case. CHP Padilla, the affiant of the search warrant, was working out of Santa Cruz County at
13 the time he executed his affidavit in support of the search warrant. However, California Penal
14 Code Section 1528(a) requires that a magistrate "issue a search warrant. . .to a peace officer in
15 his or her county. . . ."

16 Further, there is specified in the warrant "surveillance" that allegedly further supports the
17 warrant. No tapes have yet been provided to the defense.

18 CONCLUSION

19 The defense requests that the sealed portion of the February 1, 2008 search warrant be
20 reviewed by this Court and counsel advised of the Court's determination of the discoverability of
21 the contents of the sealed portions.

22 Additionally, the defense requests that in the event the material reviewed is disclosed to
23 the defense, that the defense be given an opportunity to challenge the search.

24 Dated: January 5, 2009

Respectfully submitted,
MARY E. CONN & ASSOCIATES

26 /s/

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Mary Elizabeth Conn
Attorney for Defendant Tommy McIntosh
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